No. 76-1579

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRAND LODGE OF FREE AND ACCEPTED MASONS, MASONIC HOME, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The unpublished order of the court of appeals is set forth at Pet. App. 14. The decision and order of the National Labor Relations Board (Pet. App. 15-16) are reported at 215 NLRB 75. The Board's supplemental decision and order (Pet. App. 17-23) are reported at 220 NLRB 1318.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1977 (Pet. 2). The petition for a writ of certiorari was filed on May 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated the National Labor Relations Act by demanding, as a condition of collective bargaining, that the union waive its rights to represent certain strikers and to seek their reinstatement, and by refusing to reinstate unfair labor practice strikers.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

1. Petitioner and Local No. 1511 and Council No. 55, American Federation of State, County and Municipal Employees, AFL-CIO ("the union"), were parties to a collective bargaining agreement which expired on February 1, 1970. On February 5, 1970, the union called a strike in support of its contract demands. (A. 487, 489-490, 90.)[1] Negotiations for a new contract continued during the strike. In addition to the economic issues separating the parties, the right of strikers to reinstatement was the subject of continual discussion at the contract negotiating meetings. Petitioner took the position that certain strikers had engaged in serious strike misconduct, which made them not reemployable, and that it was the union's duty to identify and tender resignations for those strikers and to agree not to represent them or seek their reinstatement. (A. 492, 171-172, 174-177, 182-185, 204, 220-221, 100-101.)

The union denied knowledge of any striker who had engaged in such misconduct but it urged petitioner to provide information on the subject and offered to investigate

[1] "A." references are to the appendix to the briefs in the court below. A copy of the appendix has been lodged with the Clerk of this Court.

any specific instances of alleged wrongdoing to see if it could identify the culprits. The union pointed out that petitioner's right to deny reinstatement to certain strikers because of strike misconduct could be resolved, as discharge issues were resolved, through the contract grievance and arbitration procedure. (A. 492, 171-172, 175, 183-185, 133, 192.) Petitioner rejected the suggestion that issues of strike misconduct or striker reinstatement be resolved through the grievance and arbitration procedure and insisted that the union must agree "not [to] represent" strikers who were "not reemployable" before there could be "fruitful" contract negotiations (A. 496-498, 176-177, 183-184, 101). However, petitioner did not identify those strikers it believed were not reemployable because of strike misconduct, urging instead that the union had special knowledge of this matter and a responsibility to identify the offenders (A. 492, 505, 174-176, 115, 128-129, 217).

Petitioner conditioned any agreement on the union's waiver of its right to represent strikers who were assertedly not reemployable. Moreover, petitioner's counsel stated that, before there could be any agreement, the union would have to give up its right to arbitrate any question concerning reinstatement of strikers (A. 495-499, 175-177, 204).

Petitioner reiterated its views concerning striker reinstatement in correspondence with the union during the strike. On July 14, 1970, petitioner's counsel wrote (A. 495, 306-307):

> Please be * * * advised that it will be the Employer's position that any employee who has engaged in any violence, physical damage, vandalism, etc., will not be reinstateable upon conclusion of the strike. Since the Union has inside information as to who these persons are, we shall expect that the Union present us with a list of such names and would be willing to discuss their situation.

On August 24, 1970, petitioner's counsel wrote rejecting the union's "proposal that the last step of the Grievance Procedure be invoked for your members participating in the acts of violence, vandalism, physical damage, etc." The letter added: "We cannot believe that the Union seeks to continue to represent such persons! Thus, the Union should accept its responsibilities to obtain their resignations" (A. 499-500, 309-310). Petitioner further advised the union in this letter that strikers not guilty of strike misconduct would be reinstated to available vacancies, in accordance with their seniority and qualifications, and that the "decisions therein shall rest solely with the Employer and shall not be covered by the Agreement, nor amenable to the grievance procedure" (A. 500, 310).

On November 11, 1970, petitioner announced that it would offer reinstatement to only 21 named strikers after the strike and that "[b]arring unforeseen circumstances or developments, no other personnel would be reinstated" (A. 503, 507, 321-322). Contract negotiations continued with the aid of mediators from the Michigan Employment Relations Commission (Pet. App. 23; A. 312-319, 432-438, 462-468, 178).[2] A collective bargaining agreement was finally signed in December 1970 and the strike ended. Petitioner denied reinstatement to more than 80 strikers and later withdrew recognition from the union and refused to

[2]Contrary to petitioner's suggestion (Pet. 6), the record does not show that the Chairman of the Michigan Employment Relations Commission stated during negotiations that there would be "no problem" with respect to the reinstatement of strikers. Rather, Chairman Howlett urged the parties "to resolve the current impasse" and adverted to two areas of disagreement: (1) the collective bargaining agreement ("I was pleased to find * * * that you are not as far apart as I had feared"), and (2) striker reinstatement ("I also believe the apparent dispute concerning the employees who will return, and will not return, may not be as difficult as it appears to be on the surface") (A. 312-313).

bargain on the ground that the union had lost its majority. (A. 503, 507, 508-509, 90-91, 179-180, 114-115, 15, 26-27.)

2. The Board found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by demanding, as a condition of collective bargaining, that the union waive its right to represent, or seek reinstatement for, certain strikers. This demand was found to have prolonged the strike and converted it into an unfair labor practice strike. The Board further found that, by denying reinstatement to unfair labor practice strikers upon their application for work at the end of the strike, petitioner violated Section 8(a)(3) and (1) of the Act.[3] Finally, the Board found that petitioner violated Section 8(a)(5) and (1) by subsequently refusing to recognize or bargain with the union, since any loss of majority the union suffered was attributable to petitioner's unfair labor practices (Pet. App. 15-16; A. 509-510, 518-524). The Board ordered petitioner, *inter alia*, to recognize and, upon request, bargain with the union, and

[3]Petitioner erroneously states that an arbitrator who heard grievances based on the failure to reinstate strikers "upheld the Petitioner's position" (Pet. 7). The arbitrator found, contrary to petitioner's position, that the denial of reinstatement was arbitrable (A. 298-299) and that petitioner violated the collective bargaining agreement "by hiring new employees to fill bargaining job openings occurring since the end of the strike without first offering such openings to qualified grievants" (A. 290, 299-300, 301-302). In the present proceeding, the parties stipulated that the Board should not defer to the arbitrator's decision as dispositive of the issue presented here (Administrative Law Judge's Exhibits 1-3). The arbitrator did not determine the statutory rights of the strikers and, specifically, never considered whether, as unfair labor practice strikers, they were entitled to reinstatement even though their jobs were filled by replacements. Accordingly, the Board's order provides a remedy for replaced strikers that was not available under the arbitral award (A. 509-510, 521-522, 526, 290, 300-301). In addition, the union contended before the Board and the court below that petitioner had failed to comply with the arbitral award so that even unreplaced strikers were still without relief (A. 67).

to offer reinstatement with back pay to the strikers, dismissing, if necessary, any employee hired after the strike became an unfair labor practice one (Pet. App. 15-16; A. 525-526).[4]

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 14).

ARGUMENT

The petition raises only the question whether the decision of the court of appeals that the Board's findings are supported by substantial evidence (Pet. App. 14) represents a proper application of the standard of judicial review established in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. That evidentiary issue does not warrant review by this Court. Moreover, the Board's findings are supported, not only by the credited testimony,[5] but by undisputed documentary evidence (*supra*, pp. 3-5). Petitioner cites nothing to show that the Board's findings are erroneous nor to support its assertion that the court of appeals refused to review those findings (Pet. 2, 11-12).[6]

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[4]The Board also rejected petitioner's defenses (1) that the strike was illegal because the union had failed to give the requisite notice to the mediation authorities, and (2) that strike misconduct made it inappropriate to offer reinstatement to the strikers or to bargain with the union (Pet. App. 18-23; A. 510-520). The legal basis for these findings is not challenged in this proceeding.

[5]The Board affirmed the credibility resolutions of the administrative law judge, who saw and heard the witnesses (Pet. App. 16, n. 1).

[6]The decisions of the Second and Sixth Circuits in other cases, which petitioner attacks (Pet. 10-11), are consistent with the principles established in *Universal Camera Corp.*, *supra*, 340 U.S. at 495-497, and *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659-660.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1977.

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*The Solicitor General is disqualified in this case.

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